MOTION FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. [redacted]

DAWSON CHEMICAL COMPANY,
CRYSTAL MANUFACTURING CORPORATION,
CRYSTAL CHEMICAL COMPANY,
AND HELENA CHEMICAL COMPANY,

Petitioners,

v.

ROHM AND HAAS COMPANY,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AND ATTACHED BRIEF ON BEHALF OF THE AMERICAN RICE GROWERS EXCHANGE AS AMICUS CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. 79,699

DAWSON CHEMICAL COMPANY,
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The American Rice Growers Exchange ("ARGE") respectfully moves this Court, pursuant to Rule 42 of the Rules of the Supreme Court of the United States, for leave to file the attached brief as *amicus curiae* in the above-captioned case.

Counsel for Petitioners has consented to the filing of the attached brief. The consent of the Respondent was requested but refused.

The ARGE is an organization of agricultural cooperative associations representing the grain producers in and around

seven cities in Southwest Louisiana[1] and nine cities in Southeast Texas.[2] From its inception, ARGE has had as one of its primary objectives, and has been active in, the promotion of more efficient, profitable and successful production of rice and other agricultural products by its members, the producer cooperatives. In this regard, ARGE's functions include (1) serving as a clearinghouse for the collection and dissemination of agricultural information helpful to its members; (2) providing a forum for the exchange of ideas between and among its members; and most importantly, (3) supplying to the farmers of the producer cooperatives the fertilizers, seeds and agricultural chemicals, including pesticides, required to increase crop yields and improve product quality.

The ARGE has a keen interest in obtaining for its member cooperative associations and, ultimately, the farmers comprising the cooperative associations, the optimum quantity, quality and value of goods and services necessary to the continued and increasing success of their agricultural endeavors. As shown in the attached brief, the opinion of the Court below, if allowed to stand, goes far in thwarting this interest and, additionally, has potential adverse consequences for the public, as consumers of agricultural products, and the general business community.

The circumstances of this case provide an excellent opportunity for this Court to decide an important and complex question of law having an impact on the agricultural industry and others that extends far beyond the interests of the parties. ARGE urges, therefore, that the Court take advantage of this opportunity by granting the Petitioners'

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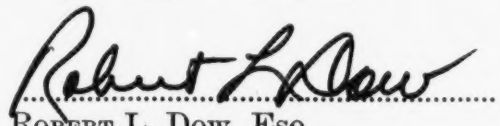
[1] Abbeyville, Elton, Iowa, Thornwell, Fenton, Holmwood, Welsh

[2] Beaumont, Devers, Garwood, Anahuac, Daton, Eagle Lake, Katy, Danevany, Richmond

request to issue a writ of certiorari to review the judgment and opinion of the Fifth Circuit Court of Appeals.

Respectfully submitted,



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BRIEF FOR THE AMERICAN RICE GROWERS EXCHANGE AS AMICUS CURIAE

INTEREST OF AMICUS

The American Rice Growers Exchange ("ARGE"), as set forth in the foregoing Motion, is an organization of agricultural cooperative associations devoted primarily to the promotion of increased efficiency and profitability in the production of rice and other agricultural products by its members. ARGE provides its member associations, and the farmers comprising them, with many of the goods and services required by them in the successful carrying on of their businesses. Foremost among the goods supplied by ARGE are the fertilizers, seeds, and agricultural chemicals, including pesticides, so vital to the attainment of higher

crop yields and improved product quality in the race to keep pace with the ever-increasing demand for food.

The product at the heart of the present dispute, propanil, is a key weapon in the farmer's arsenal against pests and, as such, has been offered by ARGE to its members for nearly twenty years. The propanil distributed by ARGE includes that manufactured by the Petitioners herein.

The opinion of the Court below, in permitting Respondent to monopolize the sale of unpatented propanil for use in its patented method, greatly disturbs ARGE. As set forth below, this opinion will have serious adverse economic consequences for ARGE, its member associations and individual farmers, as well as for the consuming public and the business community as a whole.

ARGUMENT

Perhaps the most immediate and direct adverse effect of the decision below is the unwarranted increase in the cost of doing business that will be experienced by the rice-producing farmers both within ARGE and elsewhere. Since the Fifth Circuit's decision grants Respondent the exclusive right to sell propanil, Respondent, as a monopolist, will be able to set for propanil an artificially high price, unrelated to any price it could expect to establish for a license to farmers or others strictly under its use patent, and free of the price-moderating effects of competition with potentially licensed producers of propanil such as Petitioners. The artificially high price Respondent will be able to charge for its propanil will result in increased costs and decreased profitability of producing rice. This increase in cost of production will eventually be reflected at the supermarket in increased costs to consumers. Decreasing the profitability of producing rice also acts as a disincentive to further production which, of course, will tend to diminish food supplies in the face of increasing worldwide demand.

The decision below, in authorizing Respondent to prevent anyone else from selling propanil for so long as it chooses during the life of its use patent, forecloses ARGE and its members from doing business how and with whom it chooses with regard to a product which, according to the courts, is not itself worthy of patent protection. ARGE has been engaged with Petitioners for many years in a mutually satisfying business relationship in the supply of propanil by Petitioners to local rice producers. Petitioners, as locally based manufacturers and distributors of propanil, have become acutely aware of and attuned to the particularized pesticide needs of local rice producers, and have demonstrated a desire and ability time and again to meet those needs. This mutually satisfying and long-standing business relationship between ARGE, its members and Petitioners was, for the most part, established prior to the issuance of Respondent's use patent, and certainly long prior to the decision below which, if allowed to stand, will greatly injure that relationship. ARGE does not wish to imply that it does not or will not deal with Respondent in the supply of propanil to its members, but only that the decision below removes any element of choice on the part of ARGE, and the advantages of competition among suppliers.

It is also apparent that by placing the means of supply of a vital product such as propanil in the hands of but a single seller such as Respondent, there is an inherent danger of that single seller's being unable to meet the demand for that product where, when and as it arises. An interruption of supply from that single seller, for whatever reason, could prove disastrous to the buyers

who are relying on that supply, especially in the agricultural industry where timing in application of fertilizers, pesticides or other chemicals is critical. By allowing one or more local licensees to participate in the sale and distribution of that vital product, the danger of shortfall in supply is greatly reduced.

ARGE believes that the Fifth Circuit's decision in favor of Respondent provides disincentives for research and development in the chemical industry at least as great as any which might arise by reason of a decision in favor of Petitioners. By foreclosing the market for an unpatented compound to all but the holder of a use patent for that compound, at least as long as no other substantial non-infringing use is apparent, there is no incentive for anyone but the patentee to develop innovative, more efficient and less costly processes for manufacturing that compound, or improved formulations of that compound. Petitioners have already developed new and less costly methods of producing propanil, and an improved formulation which lessens the chance of injuring rice, but as a result of the opinion below will be prevented from utilizing them.

According to Respondent, direct user licensing of its patent is impractical, and implied licensing of users through purchase of propanil from it is the only practical method by which it can obtain the value of its patent. There are other avenues, however, open to it in addition to a license to sell propanil as requested by Petitioners but refused by Respondent. Direct use licensing of centralized organizations such as ARGE or its member cooperatives, with royalties based on subscriptions by the individual farmers, is certainly feasible. Likewise, licensing of ARGE to supply to its customers propanil manufactured by others than Respondent is clearly feasible. Respondent does not suffer from want of methods by which it may exploit its patent.

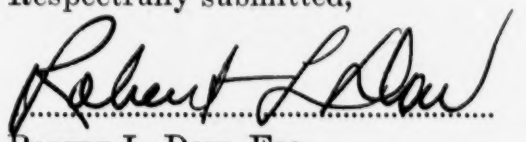
Finally, there is no clear test under the patent laws of whether or when a product sold for use in conjunction with a patented machine or method is or becomes a "staple" or a "non-staple," or when and under what circumstances a use is "substantial" and "non-infringing." Armed with the decision of the Court below, in cases of doubt as to the staple-non-staple nature of goods, an aggressive patentee can use his patent to acquire an unwarranted monopoly over goods which are, in fact, staples, which were never intended to be embraced in any manner within the patent grant. When faced with the threat of an infringement suit, purchasers of the goods in question will be forced to buy from the patentee, to the exclusion of other lawful sellers. This threat of unwarranted monopoly extends not only to goods used in conjunction with patented methods, but also to goods used in conjunction with patented machines. This threat alone would appear to be sufficient reason for this Court to grant, at this time, the review requested by Petitioners.

CONCLUSION

The decision of the Fifth Circuit Court of Appeals will have an adverse economic impact on the agricultural industry, the consuming public and the business community that extends beyond the interests of the parties to this case. The decision will cause an unwarranted increase in the cost of producing rice, will disrupt long-standing business relationships in the agricultural industry in Texas, Louisiana and elsewhere, and will lead to extensions of patent monopolies to products never intended by Congress to be embraced within the patent grant. The decision involves a complex question of law which should be decided by this Court.

The petition should be granted.

Respectfully submitted,



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